In the United States Court of Appeals
for the Ninth Circuit

No. 20,930

SAN FRANCISCO MINING EXCHANGE, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

BRIEF FOR RESPONDENT SECURITIES AND EXCHANGE COMMISSION

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JURISDICTIONAL STATEMENT

This is a petition by the San Francisco Mining Exchange to review an order (R. 5586-5597)[1] of the Securities and Exchange Commission entered April 22, 1966, pursuant to Section 19(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(a)(1), withdrawing its registration as a national securities exchange.[2] On June 22, 1966, petitioner filed a brief

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[1] References to pages of the reproduced record are cited as "R. ——" and to pages in petitioner's brief as "Br.——".

[2] The effectiveness of this order has been stayed pending this review proceeding. See orders of this Court, dated May 4, 1966 and July 11, 1966.

which served as its petition for review.[3] Jurisdiction of this Court is based on Section 25(a) of the Securities Exchange Act, 15 U.S.C. 78y(a).

COUNTERSTATEMENT OF THE CASE

Statutory Basis of the Proceeding

The Securities Exchange Act of 1934 imposes upon registered national securities exchanges an affirmative obligation to assist in the enforcement of the Act.

Section 6(a) of the Act, 15 U.S.C. 78f(a), requires that the registration statement of the Exchange contain an agreement obligating the Exchange:

> "to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title . . . and any rule or regulation . . . thereunder."

Section 6(b) of the Act, 15 U.S.C. 78f(b), provides:

> "No registration [of an exchange] . . . shall remain in force unless the rules of the exchange

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[3] The proceeding in this Court was commenced by petitioner's filing its brief rather than a petition for review, as is contemplated by the rules of this Court (Rule 34.1). Therefore, filing of the certificate of the record by the Commission, designations of the portions thereof for copying, and transmission by the Commission of the designated portions of the record to the Court followed rather than preceded petitioner's brief. Because of petitioner's departure from this Court's rules, presumably the Commission's brief would not have been due until at least the due date for petitioner's brief, had it complied with the Court's rules, *i.e.*, 30 days after the Clerk of the Court has filed copies of the record with this Court (Rule 18.1). We have been advised that this was done on October 27, 1966.

> include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade."

Finally, Section 19(a)(1) of the Act, pursuant to which this proceeding was instituted, empowers the Securities and Exchange Commission, after notice and opportunity for hearing, to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange "if in its opinion such action is necessary or appropriate for the protection of investors" and if it finds that the exchange:

> "has violated any provision of this title or of the rules and regulations thereunder, or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon."

The Uncontested Findings

Petitioner concedes (Br. 41) that the hearing examiner's findings of fact were "in accordance with the stipulations, the exhibits and the oral testimony." The Commission in its opinion adopted those findings and repeated them only to the extent necessary to an understanding of the issues presented (R. 5588). These findings demonstrate that the hearing examiner and the Commission were fully justified in holding that "the [petitioner] . . . has violated the Exchange Act

and has failed to enforce compliance therewith" (R. 5594), and, indeed, that petitioner's history was one of " 'pervasive and abysmal abdication of responsibility' " (R. 5482, 5596).

In 1961, the last full year before the institution of this proceeding, stocks of only four companies with net earnings were listed on the San Francisco Mining Exchange. In all, there were 42 stocks listed on the Exchange; the average price per share of these stocks was 14¢; at least 15 of the issuing companies had no revenue and eight others had less than $1000 of revenue. As of December 1962, twenty-five of these companies were not actively engaged in operations (R. 5588). Almost all of the active trading on the floor of the Exchange in recent years has been conducted by four of the Exchange's 13 regular members. Aside from the secretary, the Exchange had only one salaried employee, its president's brother, who was paid to put quotations on the blackboard during trading sessions and to perform other clerical and messenger functions (R. 5588).

In view of the discussion of petitioner's violations in the Commission's opinion (R. 5588-5595) and the even more extended treatment thereof in the recommended decision of the hearing examiner (R. 5405-5471), they will not be detailed here. In short, the Commission found that companies listed on the Exchange frequently filed late, if at all, the reports required by law[4] (R. 5588-5589), and that the Ex-

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[4] Section 13(a) of the Exchange Act, 15 U.S.C. 78m(a), and Rules 17 CFR 240.13a-1 and .13a-11 thereunder require every issuer of a security registered on a national securities

change's failure to require compliance by such companies not only "frustrate[d] the statutory objective of keeping existing and potential investors informed of material corporate activities and events" but also served "to help conceal public distributions of unregistered securities in violation of the Securities Act of 1933" and to facilitate other violations of that Act, including violations of its antifraud provisions (R. 5589). Over the years, the Commission has had to delist from the Exchange securities of twenty-eight companies by reason of their violations (R. 5594). Among the listed companies which have flagrantly violated the reporting requirements was a company of which the president of the Exchange was president and a major stockholder (R. 5588). The treasurer of the Exchange, in violation of the registration provisions of the Securities Act of 1933, sold large blocks of stock of another company listed on the Exchange on behalf of that company's promoter (R. 2361, 5592). A member of the Governing Committee of the Exchange and of the Stock List Committee, who in 1962 became vice president of the Exchange and chairman of the Governing Committee, utilized one listed company in the year prior to the institution of this proceeding to perpetrate what the examiner and the Commission characterized as a "corporate shell

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exchange to file with this Commission and with the exchange, an annual report within 120 days after the close of each fiscal year, and a current report within 10 days after the close of each month during which there occurs any of a number of specified events which are considered material information for investors.

game" [5] (R. 5444, 5591). On a prior occasion this same official of the Exchange, with the cooperation of the Exchange's secretary, had utilized another listed corporate shell in the distribution of large blocks of stock through false and fraudulent representations, and a false report concerning his stock ownership had been filed by the company with both the Commission and the Exchange (R. 5590).

The Commission also found that the Exchange had made no attempt to enforce the filing of stock ownership reports required of officials and large stockholders of listed corporations [6] (R. 5592-5593). Indeed, among

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[5] This type of activity had earlier been described by the Commission in delisting the stock of another company listed on the Exchange, as follows:

> "The situation here presented is one where a dormant, insolvent corporation, whose chief value lay in the registration and listing of its stock on the Exchange, was reactivated by a group which accumulated various properties to be transferred to the registrant in exchange for large blocks of its stock. Most of the properties were undeveloped or of a speculative nature and in large measure were subsequently abandoned. The large blocks of stock issued in exchange therefor were not registered under the Securities Act and were issued without any restrictions or precautions to prevent illegal public distribution of unregistered securities, and in fact some of those shares were involved in a public distribution without the disclosures and safeguards inherent in registration under the Securities Act." *Operator Consolidated Mines Company*, 39 S.E.C. 580, 594 (1959).

[6] Section 16(a), 15 U.S.C. 78p(a), and the rules promulgated thereunder require beneficial owners of more than 10 percent of a class of equity securities registered on a national securities exchange and officers and directors of the issuer of such securities to file with the Commission and appropriate

the repeated violators in this regard were the president and vice president of the Exchange. One member active in the management of the Exchange filed several false reports (R. 5593). Despite these open and notorious violations no disciplinary action was taken concerning them, and indeed, the only disciplinary action taken in more than 10 years was to fine one member in 1961 for the use of intemperate language and to suspend him in 1962 after the Commission had instituted a disciplinary proceeding against him (R. 5593-5594).

SUMMARY OF ARGUMENT

1. The uncontested record establishes that the Exchange for years had permitted violations of the securities laws by its members and listed companies, thereby depriving investors of essential protections and facilitating the manipulation of security prices on the Exchange. The Exchange has had innumerable opportunities to reform but has not done so. Accordingly, the Commission's decision that withdrawal of the Exchange's registration was the appropriate remedy was fully justified. This was a policy determination which court decisions make clear was well within the Commission's discretionary authority. The Commission, which is entrusted with the responsibility of protecting the public, was not required to adopt the remedy recommended by its hearing examiner nor to accept the suggestions made by certain

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exchanges reports of their beneficial ownership of equity securities of such issuers and of any changes in such ownership.

public officials and others that the Exchange should be allowed to continue. The record amply demonstrates injury to the public, and the fact that public investors were not called to testify is irrelevant.

2. The material upon which the Exchange relies to demonstrate bias and prejudice shows only that the procedures employed by the Commission in this case conform to the standard practice of administrative agencies, and that a special concession was made for petitioner's benefit in that it was permitted to review the investigation report of the Commission's staff in advance of the institution of proceedings. Even if the Commission or any of its members had believed, prior to instituting the proceeding, that withdrawal of the Exchange's registration was the only appropriate remedy should the charges in the staff report be ultimately established, this would not have been a disqualifying prejudgment.

Courts have held that to subpoena Commission members and documents on the issue of disqualification a party must make some independent showing pointing to possible bias or prejudice. Permitting random inquiry into the state of mind of administrative adjudicators would be destructive of the administrative process. Here counsel for the Exchange had no independent evidence of bias; indeed, ~~in that~~ he conceded that he merely wanted to explore the question of whether evidence existed to justify a formal charge of bias of prejudice. Moreover, the petitioner did not comply with applicable requirements of the Administrative Procedure Act.

ARGUMENT

I. The Commission's Withdrawal of the Exchange's Registration, in the Light of the Uncontested Facts, Was Well Within the Commission's Discretionary Authority.

A. *The Remedy Ordered by the Commission Is Warranted by the Record.*

Petitioner argues that the Commission's withdrawal of its registration as a national securities exchange, found by the Commission to be necessary and appropriate for the protection of investors (R. 5594), was not warranted by the record, and that the Commission should have adopted the hearing examiner's suggested remedy of granting the Exchange an opportunity to attempt a complete reorganization (Br. 41). It seeks to have this Court set aside the Commission's order and provide for a reorganization under a court's —apparently this Court's—supervision (Br. 49).

The Commission's withdrawal of the Exchange's registration was clearly justified in light of the undisputed finding that the Exchange "totally abdicated its vital self-regulatory function required by Section 6(b) of the Exchange Act" (R. 5594).[7] As the Commission noted (R. 5593):

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[7] *Baird* v. *Franklin*, 141 F.2d 238 (C.A. 2, 1944), *certiorari denied*, 323 U.S. 737 (1944), holds that a failure by an Exchange to enforce its own rules against members is a violation of Section 6(b) of the Exchange Act. Such inaction by an exchange would accordingly come within both bases for withdrawal of registration under Section 19(a)(1). That is, it would constitute both a violation of the Act by the Exchange and a failure to enforce the Act.

> "The self-policing function of a registered national securities exchange is of the utmost importance in fulfilling the statutory scheme of cooperative regulation of the securities markets in the interest of protecting the public."

The Commission contrasted this responsibility of an exchange with petitioner's "history of failure to prevent or punish violations, inadequate and careless procedures, inadequate standards and organization, and dormant and marginal listed companies" (R. 5595).

Since the Commission found there was "nothing of substance to salvage of the present Exchange" (R. 5595), it appropriately held (R. 5596):

> "Any 'reorganization' of this mere facade of an exchange would of necessity involve the creation of an entirely new structure, retaining nothing of the old form except possibly its name. The hearing examiner himself stressed that any reorganization must include 'all functional aspects' and present 'entirely *new personnel in every department of management without exception.*' Such a 'reorganization' would in essence be the withdrawal of the registration of the present Exchange and the registration of a completely new exchange. We recognize this reality by withdrawing the registration of this Exchange." (Emphasis in original.)

As the Commission pointed out, the Exchange has had innumerable opportunities to reform itself. That its activities fell far short of the required standard of behavior had been brought to its attention by numerous letters from the Commission's staff with re-

spect to reporting violations and by the fact that the Commission had found it necessary to withdraw the registration of securities of 28 companies listed on the Exchange "on the basis of findings of violations of various provisions of the securities acts . . ." (R. 5594). Moreover, as the Commission noted (R. 5594-5595):

> "In 1957, after the institution during that year of four proceedings which subsequently resulted in delisting orders on the basis of findings of violations of the reporting and proxy soliciting requirements, our staff made specific written recommendations to the Exchange as to changes in rules and procedures considered necessary to enable the Exchange to meet the standards applicable to a registered national securities exchange. The Exchange up to 1962 adopted only some of these recommendations and partially carried out others. It took no action with respect to some recommendations, including those for the supervision of members' personal trading, the delisting of the securities of dormant and inactive issuers, and the improvement of listing standards." (Footnote omitted.)[8]

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[8] On March 26, 1962, the Exchange did adopt a rule concerning member trading (R. 2656).

No efforts have been made to reform the Exchange during the pendency of this proceeding, apparently on the advice of its counsel that such action might be "contemptuous" (R. 5574) or taken " 'presumptively' " (*sic*) (R. 5584). We are aware of no basis for this assumption and counsel for petitioner admitted at oral argument before the Commission that no member of the staff had ever stated that the Exchange should not correct its procedures during the pendency of this proceeding (R. 5583-5584).

B. *The Remedy Ordered by the Commission Is a Policy Determination Within Its Discretion.*

Section 19(a)(1) provides that the Commission may suspend or withdraw the registration of a registered exchange "if in its opinion such action is necessary or appropriate for the protection of investors" and if it finds, after hearing, that the exchange has violated any provision of the Act or has failed to enforce compliance with the Act. In interpreting the parallel clause (3) of § 19(a), which authorizes the Commission to suspend or expel any member from a national securities exchange if in the Commission's "opinion such action is necessary or appropriate for the protection of investors" and that member is found after hearings to have violated any provision of the Act, the Court of Appeals for the Second Circuit has stated that it was "without power to supervise the Commission's discretionary determination that expulsion of the petitioner is necessary and appropriate for the protection of investors." *Wright* v. *Securities and Exchange Commission*, 112 F.2d 89, 95 (1940). The court also noted in that case:

> "Congress has defined the conduct that is unlawful and has left to the administrative agency, subject to judicial review, discretion to determine whether protection of investors requires that one who has been found guilty of unlawful conduct on a national securities exchange should be temporarily or permanently excluded from carrying on activities as a member of such an exchange." (112 F.2d at 94-95.)[9]

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[9] Other holdings with respect to the Commission's broad discretion in determining suitable remedies and sanctions for

The Commission's conclusion that, because of the Exchange's repeated failures to prevent or punish violations by its members and its listed issuers, the public interest requires withdrawal of the Exchange's registration—rather than some other remedy—is a policy determination wholly within the broad discretion given to the Commission by Congress in entrusting it with the responsibility of effectuating the statutory policies. As the Supreme Court noted in *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 112-113 (1946):

> "It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.' . . . Its judgment is entitled to the greatest weight. While recognizing that the Commission's discretion must square with its responsibility, only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter."

See also *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 208 (1947), where it was

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violations of the Securities Exchange Act include: *Pierce* v. *Securities and Exchange Commission*, 239 F.2d 160 (C.A. 9, 1956); *Associated Securities Corp.* v. *Securities and Exchange Commission*, 283 F.2d 773 (C.A. 10, 1960); *Boruski* v. *Securities and Exchange Commission*, 289 F.2d 738 (C.A. 2, 1961); *Berko* v. *Securities and Exchange Commission*, 316 F.2d 137, 141-142 (C.A. 2, 1963). See also *Nassau Securities Service* v. *Securities and Exchange Commission*, 348 F.2d 133, 136 (C.A. 2, 1965).

stated that "reversal of the Commission's judgment" was precluded "save where it has plainly abused its discretion in these matters." In that case, as in this, the facts were undisputed. Under such circumstances, the Court noted that it was "free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation" (332 U.S. at 207).

The Supreme Court has recently articulated the underlying reasons for allowing an agency broad discretion in fashioning remedies:

> "It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." (Footnotes omitted.) *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620-621 (1966).[10]

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[10] See also, *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946), where the Supreme Court made it clear with respect to another administrative agency that "it is the Commission, not the courts, which must be satisfied that the public interest will be served . . . . And the fact that we might not have made the same determination on the

C. *The Commission Is Not Required to Adopt the Remedy Recommended by Its Hearing Examiner or Suggestions of Petitioner's Witnesses.*

Since it concluded on the basis of the record that withdrawal of petitioner's registration as a national securities exchange was "necessary and appropriate for the protection of investors" (R. 5594), the Commission was not compelled to adopt the lesser remedy recommended by its hearing examiner. In the light of its responsibility to protect the public interest, the Commission could appropriately require withdrawal even if the hearing examiner had been convinced that the Exchange might be able to remedy its previous indifference to the public interest and to discontinue its affirmative misconduct. Indeed, even where the Commission might disagree with the hearing examiner as to testimonial facts, the Commission's findings are conclusive if supported by substantial evidence—not those of the hearing examiner, whose findings might also be supported by substantial evidence. See Section 25(a), 15 U.S.C. 78y(a). And see *Pierce* v. *Securities and Exchange Commission*, *supra* note 9, where the Commission's findings differed from those of its hearing examiner. In that connection this Court stated:

> "The Commission is given the duty to protect the public. What will protect the public must involve, of necessity, an exercise of discretionary determination. This Court ordinarily should not

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same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter."

> substitute its judgment of what would be appropriate under the circumstances in place of the Commission's judgment as to measures necessary to protect the public interest . . . . Since the evidence substantially supports the Findings of the Commission as to violations of law by the petitioner, we cannot conclude that the Commission abused its discretion in denying him registration." (239 F.2d at 163-164.)

See also *Consolo* v. *Federal Maritime Commission*, *supra* p. 14, 383 U.S. at 620: "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

In view of the Commission's responsibility to make the policy determination of whether it was in the public interest to require the registration of the Exchange to be withdrawn, it was not constrained to accept the views of officials who testified on behalf of the Exchange. In any event, the testimonials on which the Exchange relied were given before the presentation of the evidence against it had been concluded, and many of them had been written before the hearing had begun. Governor Sawyer specifically stated that he had no knowledge of the "seriousness" of the charges against the Exchange (R. 3010). The Executive Vice-President of the San Francisco Chamber of Commerce admitted, on cross-examination, that the Chamber had adopted its resolution prior to the commencement of the hearings, after an *ex parte* appearance by the Exchange's counsel accompanied by a controlling person of a "corporate shell" listed on the Exchange, and without any attempt by the Chamber

of Commerce to determine the bases for the Commission's charges (R. 1562-1587, 1591-1595, 1642-1650, 1656-1659, 1710-1730).[11]

D. *The Record Amply Demonstrates Injury to the Public and the Fact That Public Investors Were Not Called to Testify Is Irrelevant.*

The petitioner's contention that it was necessary for the Commission to prove that members of the public suffered monetary losses is merely a complaint that no public investors were called to testify as to their losses (Br. 47). Section 19(a)(1) does not make a showing of monetary loss by investors a prerequisite to withdrawal of the registration of a securities exchange. The premise of the Exchange Act is that the public is entitled to the protections of that Act, including all the disclosures required therein; violations of the Act are, accordingly, injurious to the

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[11] The California State Mining Board hedged its support for the Exchange with the proviso "that it operates within the regulations of the Security Exchange Commission, and that any irregularities within the Exchange be corrected" (R. 2973).

The statement of the American Mining Congress urging continuation of the Exchange does not appear to be based on its own knowledge but on the advice of an unnamed person or persons (R. 3011-3012).

Petitioner also contends that the American Institute of Mining Metallurgical and Petroleum Engineers, Inc. ("AIME"), supported the Exchange's position (Br. 45), but the record does not disclose any such communication from AIME. The record does contain a letter on AIME stationery which specifically states that the opinions expressed therein are not an official expression of opinion by AIME but merely the opinions of the correspondent (R. 3013).

public. As was pointed out in *Berko* v. *Securities and Exchange Commission, supra* note 9, 316 F.2d at 143,

> "The Commission's duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury."

In any event, the record amply demonstrates that the public suffered financial injury. The listing on the Exchange and distribution of the stock of Comstock, Ltd., in violation of the registration requirements of the Securities Act and the accompanying manipulation, engineered by the members of the Exchange, of the market price of the stock causing a rise in price from 1 cent to 36 cents per share (R. 5419-5436) necessarily resulted in losses to those who were enticed into the contrived market and who were holding the stock when trading was suspended and the worthless quality of the issue was revealed. Similarly, the manipulation of the market price of the stock of Industrial Enterprises, Inc. from 17 cents per share to $2.25 per share (R. 5437-5447) is another instance where members of the public must have suffered losses through the abuse of the facilities of the Exchange.[12]

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[12] See also the findings and opinion of the Commission in *Archie H. Chevrier,* Securities Exchange Act Release No. 7579 (April 22, 1965).

II. Since Nothing in the Record Suggested Bias or Prejudice on the Part of Members of the Commission, Denial of Petitioner's Applications to Subpoena Them and to Subpoena Commission Documents Relating to the Institution of the Proceeding Did Not Deprive Petitioner of Due Process of Law.

A. ***The Procedures Employed by the Commission in This Case Conform to the Standard Practice of Administrative Agencies.***

The discussion in petitioner's brief in support of its contention that it was deprived of due process of law indicates a complete misconception of the administrative process, whereby an agency charged by Congress with regulating an industry determines that proceedings charging violations are to be held and also, on the basis of the evidence introduced at such proceedings, determines whether the violations have, in fact, occurred. Thus, while there is a complete segregation of staff members engaged in investigatory and prosecutory activities from those who assist the Commission in its adjudicative process, the Commission itself is necessarily responsible for both functions. For this reason, agency heads are categorically exempted from the separation-of-functions requirement of Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c). As pointed out in the legislative history of that provision, this exemption "is required by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases." [13]

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[13] S. Rep. No. 752, 79th Cong., 1st Sess. 21 (1946).

While under legislation adopted subsequent to the institution of the instant proceeding,[14] the Commission could presumably delegate its function to determine whether an administrative proceeding should be brought, it has never done so since it believes this would deprive those regulated of a measure of protection against the possibility of having to defend against unwarranted or insubstantial charges. By itself determining whether staff charges are such as to require formal proceedings, the Commission protects suspected violators against the necessity of being put to the expense and possible publicity of a hearing in the absence of a *prima facie* case against them. Accordingly, the Commission necessarily acts after consideration of the recommendation of its investigatory-prosecutory staff and may consult with that staff prior to the institution of a proceeding, just as a judge might hear, *ex parte*, a prosecutor seeking a warrant of arrest or a litigant seeking a temporary restraining order.[15] And, just as in the case of such a judge,

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[14] 15 U.S.C. 78d-1 (Aug. 20, 1962).

[15] This was recognized in the recent decision in *R. A. Holman & Co.* v. *Securities and Exchange Commission*, — F. 2d —, CCH Fed. Sec. L. Rep. ¶ 91,816 (C.A. 2, No. 30276, September 21, 1966), *petition for rehearing pending*, where a commissioner's participation in a proceeding was challenged because he had previously been director of a division of the staff which had conducted an informal inquiry that eventually led to the institution of administrative proceedings. The Court of Appeals held there was no disqualification, stating (CCH Fed. Sec. L. Rep. ¶ 91,816, at 95,790) :

> "In this case, there is no indication that Commissioner Woodside, *before his appointment to the Commission*, participated in any investigation of petitioner's activities,

when the Commission decides the case on the merits, it does so entirely upon the evidence in the formal record and the arguments openly presented to it.

The petitioner terms the events leading up to the institution of the proceeding against it a "fantastic prelude" (Br. 2), but the procedures employed conform to the standard practice followed by the Commission and other administrative agencies in instituting administrative proceedings. As the Commission noted (R. 5110) in ruling upon petitioner's application for a subpoena *duces tecum:*

> "The institution of these proceedings followed an investigation by the Division and a report concerning the Exchange made by the Division at our direction. This report was presented to us as the basis for determining whether to issue an order for proceedings. We thereupon authorized the issuance of the order for proceedings, which recited that the Division had alleged certain violations and ordered that hearings be held to determine whether or not such allegations were true."

In addition, the Commission made a special concession for the benefit of petitioner in view of the fact that it had never before found it necessary to institute

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and public proceedings to investigate petitioner's activities were not started until . . . two months after Woodside's appointment to the Commission." (Emphasis supplied.)

The Court held that the Commission was not required to divulge staff communications to the Commission "which merely concerned the nature of the *proposed* proceedings" (emphasis supplied). CCH Fed. Sec. L. Rep. ¶ 91,816, at 95,792.

a proceeding to determine whether the registration of a national securities exchange should be withdrawn. It authorized the staff to make available to the Exchange a copy of the staff's report [16]—characterized in the proceeding as "a massive bill of particulars" (R. 39)—so that the Exchange might review and evaluate the charges against it and determine whether it would not prefer voluntary withdrawal of its registration to institution of a proceeding to determine whether withdrawal should be compelled. In making this determination, the Exchange was advised to retain counsel (R. 1497, 1550-1551). After retaining counsel, the Exchange countered with an offer to submit a plan of rehabilitation.[17] The Commission's staff rejected this proposal, which might have forestalled the institution of proceedings and have resulted in a period of negotiation during which the petitioner's operations could have continued unabated. Instead,

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[16] Although under Section 21(a) of the Exchange Act, 15 U.S.C. 78(u)(a), the Commission could have made the report public, it did not do so. Copies of the report were furnished to the Exchange and its counsel in confidence, but when counsel for the Exchange referred to the report and characterized it in his opening statement (R. 26, 32), staff counsel requested that the Commission make the report public (R. 72-83). The staff's request was denied on December 12, 1962, but the Commission at that time authorized counsel for the Exchange to make the report public if he should choose to do so (R. 103, 5097). The report has not been made public and was never made a part of the record in the proceeding, although counsel for the Exchange had indicated he would introduce it (R. 36-38).

[17] The Exchange did not attempt to deny any of the charges in the report or to bring forward any mitigating circumstances.

the staff recommended the institution of the proceeding, as it had advised the petitioner it would. Thereafter, with the staff's report available to counsel for the Exchange, the parties negotiated a stipulation of certain facts underlying the staff charges (R. 2322-2367).

B. *Petitioner's Charges of Bias and Prejudice Have No Basis.*

When the hearings were commenced on December 12, 1962, contrary to the claim of petitioner that "counsel followed the cautious, responsible course of making inquiry first, rather than hurling loose charges of bias and prejudice" (Br. 29), petitioner's counsel charged in his public opening statement that the Exchange had "been subjected to 'government by blackmail' and 'regulation through extortion'," (R. 31), and that "both the report and the charges demonstrate . . . that the real gravamen of the Commission's attack upon the Mining Exchange is a fixed opinion that the Exchange should be put out of business. . ." (R. 32). The purported basis for these charges was a letter of June 28, 1962, written by the Director of the Division of Trading and Exchanges to the Commission's San Francisco Regional Administrator, stating that the Commission, after consideration of the staff's recommendation, had authorized the staff to permit the Exchange to see the staff's report and voluntarily withdraw its registration, rather than have a proceeding initiated for such withdrawal (Br. 3-4).[18]

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[18] Although petitioner purports to quote the letter verbatim, the designation, "Division of Trading and Exchanges," appear-

Thereafter, when the Division's case in the administrative proceeding had been concluded, on February 11, 1963, petitioner submitted a written application for subpoenas *ad testificandum* directed to each member of the Commission and for a subpoena *duces tecum* calling for internal correspondence, memoranda and reports relating to the institution of the proceeding against the Exchange, which was directed to Orval L. DuBois, Secretary of the Commission (R. 4966-4970). Petitioner claimed that the information to be elicited was relevant to the issue of "whether or not the members of the Securities and Exchange Commission have prejudged the issues in these proceedings and are biased and prejudiced against respondent to such an extent as to render them, and each one of them incompetent to judge said matter fairly, impartially or dispassionately" (R. 4969, 5144-5145). It is the denial of these applications for subpoenas upon which petitioner predicated its charge of lack of due process in its arguments to the Commission.[19]

These charges of bias, prejudice or prejudgment rested solely[20] upon the events which immediately

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ing on the letterhead is not quoted, and petitioner has italicized words in the letter which were not emphasized in the original (R. 5077, 5999-6000).

[19] The subpoena *duces tecum* was denied by both the hearing examiner and the Commission (R. 5014-5030, 5109-5113); the subpoenas *ad testificandum* were granted by the hearing examiner and denied by the Commission (R. 5137-5138, 5148-5150).

[20] Petitioner now states for the first time (Br. 26-28) that the fact that two members of the Commission had previously been staff officials suggests that they may have lacked "ob-

preceded commencement of the proceeding and particularly upon the letter of June 28, 1962. We do not question that the *staff* of the Division of Trading and Exchanges (now called Trading and Markets) had reached the firm conclusion that petitioner's registration should be withdrawn and that, in the words of a staff member, "Rehabilitation [is] impossible" (Br. 7). But the fact that the investigatory and prosecutory staff had reached this conclusion does not, as petitioner suggests, prove that the Commission had also reached the same conclusion. With respect to the attitude and position of the Commission, as distinct from the staff, the record shows only the following:

1. The Commission had determined that if petitioner's registration were not voluntarily withdrawn, an administrative proceeding should be commenced to determine whether or not such withdrawal should be required. As we have shown above, a determination to institute a proceeding is made by the Commission in every case in which a proceeding is commenced and shows no bias or prejudgment; otherwise, at least at the time this proceeding was commenced, which was prior to the delegation statute (see *supra*, p. 20 and n. 14), no administrative proceeding could ever have been begun.

2. The Commission had determined to afford petitioner the opportunity voluntarily to withdraw its registration rather than face a proceeding. Petitioner, of course, remained free to reject this offer, as it did.

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jectivity and impartiality." As we show at pp. 34-36, *infra*, there is no merit to this contention.

Affording this opportunity to petitioner does not show bias or prejudice, rather the contrary.

3. The Commission had determined to afford petitioner the opportunity to examine the entire staff report of investigation prior to the proceeding. While not normally done, this certainly did not prejudice the petitioner in any way; rather it afforded it the opportunity to learn in advance the entire case that the staff might present.

4. The Commission had determined not to make the staff report public, at least initially, although the Commission recognized that this might occur at some later date.[21] This again does not manifest any prejudice against the Exchange but instead protected the Exchange against the unfavorable publicity which presumably would have accompanied publication of the report.

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[21] The letter of June 28, 1962, also indicates that the Commission directed certain revisions of the staff report of investigation. Presumably, this was done in view of the possibility that the report might become a public document. In any event, since the Commission was entitled, if not required, to review the report in order to determine whether or not it should accept the staff's recommendation for proceeding, the fact that in the course of such review it directed certain revisions proves nothing with respect to bias, prejudice or prejudgment.

While the affidavit filed in support of the application for a subpoena *duces tecum* stated that the letter was "from the Securities and Exchange Commission Director," and that the letter indicated that the report was prepared "under the direction" of the Commission (R. 4969), in fact, the letter was from the Director of one of the operating divisions, the Division of Trading and Exchanges, the report is designated in the letter as a study by the staff and it is nowhere stated that the Commission supervised its preparation (R. 5999-6000).

In summary, the materials relied upon by petitioner in support of its charges of bias, prejudice or prejudgment show only that the Commission determined that there should be a proceeding, as it does in every case where a proceeding is commenced, and that in connection with the proposed proceeding, it afforded to petitioner certain privileges and advantages which are not normally provided to respondents in Commission proceedings but which the Commission thought appropriate in view of the unusual nature of a proceeding to withdraw the registration of an exchange.

Even if the Commission itself, rather than the staff of the Division of Trading and Exchanges, had prepared the report on the Exchange, this would not have made the Commission incapable of weighing all the evidence impartially in the subsequent administrative proceeding.[22] Indeed, the Securities Exchange Act

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[22] Petitioner's original contention was that the entire Commission was biased and prejudiced (R. 4969, 2181-2184). This was later modified to "or some of them" (R. 5037). Now, since of the five members who served when the order for proceedings was issued only two, Chairman Cohen and Commissioner Woodside, were also members of the Commission when the order withdrawing registration was issued, the argument seems to be that only these two Commissioners were biased and prejudiced (Br. 26-28). The other three Commissioners, Hugh R. Owens, Hamer H. Budge and Francis M. Wheat, who participated in the decision in this proceeding did not take office until long after the date, July 26, 1962, on which this proceeding was instituted. Mr. Owens first took office as a member of the Commission on March 23, 1964; Mr. Budge on July 8, 1964; and Mr. Wheat on October 2, 1964. 31 S.E.C. Ann. Rep. XIV, XV (July-June, 1965).

It should also be noted that under the rule of necessity,

specifically authorizes the Commission to conduct investigations (see Section 21(a) and (b), 15 U.S.C., 78u(a) and (b)) and to determine, after hearing, whether in the public interest sanctions should be imposed upon persons regulated who have been found to have been guilty of violations (see §§ 15(b) and 19 (a), 15 U.S.C. 78*o*(b) and s(a)). The law presumes that a public official charged with adjudicatory functions is a person capable of judging a particular controversy fairly and on the basis of its own circumstances. *United States* v. *Morgan*, 313 U.S. 409, 421 (1941); see also *National Lawyers Guild* v. *Brownell*, 225 F.2d 552, 555 (C.A.D.C., 1955), *certiorari denied*, 351 U.S. 927 (1956). And it has been held that due process was not denied where one or more members of an administrative board aided in an investigation and thereafter participated in the decision of the case. *Brinkley* v. *Hassig*, 83 F.2d 351, 357 (C.A. 10, 1936).[23] And see *Safeway Stores Inc.* v. *Federal*

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even if petitioner had established that the Commission had prejudged the issue of withdrawal, the Commission, as the only body charged by law with the duty of withdrawing the registration of a national securities exchange, would not have been precluded from acting in this proceeding. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 701 (1948); *Federal Home Loan Bank Board* v. *Long Beach Federal Savings & Loan Association*, 295 F.2d 403, 408 (C.A. 9, 1961).

[23] See also the *Attorney General's Manual on the Administrative Procedure Act (1947)* p. 58, pointing out that "if a member of the Interstate Commerce Commission actively participates in or directs the investigation of an adjudicatory case, he will not be precluded from participating with his colleagues in the decision of that case."

Trade Commission, — F.2d — (C.A. 9, No. 19325, September 14, 1966).

Moreover, even assuming that the Commission or any of its members believed when the proceeding was instituted that withdrawal of the Exchange's registration was the only appropriate remedy should the charges in the staff's report ultimately be sustained, this would not have been a disqualifying prejudgment. Otherwise the experience which may make an individual particularly valuable as an agency member would disqualify him in the very cases in which his views would be most helpful, since such a person would normally have an opinion as to the appropriate sanction for particular violations. An official charged with adjudicatory functions may be expected to "have an underlying philosophy in approaching a specific case." *United States* v. *Morgan*, *supra* p. 28, 313 U.S. at 421. Indeed, it has been noted that it is unrealistic to expect and undesirable to require "the total absence of preconceptions in the mind of the judge." *In re J. P. Linahan, Inc.*, 138 F.2d 650, 651-652 (C.A. 2, 1943). As indicated in *Federal Trade Commission* v. *Cement Institute*, *supra* note 22, 333 U.S. at 702-703, it would not be a "violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law." In that case it was held that the Federal Trade Commission was not disqualified from deciding an administrative proceeding to determine the legality of basing point practices even assuming that the Commission had already formed an opinion as to the legality of such

practices as a result of its prior investigations. The Court stated that "the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject . . ." (333 U.S. at 701).[24]

Accordingly, there is nothing improper in a Commissioner's believing prior to the institution of a proceeding that the registration of a national securities exchange should be withdrawn if it can be shown that over a period of years it has failed to take disciplinary action against its members and issuers of securities listed thereon who have committed serious violations of the Federal securities laws.[25] Of course, even should all the charges ultimately be admitted, an opportunity would be afforded counsel for such an exchange, as was afforded counsel for petitioner in this case, to attempt to persuade the members of the Commission that another remedy might be preferable.

Petitioner has the burden of proof on the issue of disqualification (*Securities and Exchange Commis-*

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[24] And see *Pangburn* v. *Civil Aeronautics Board*, 311 F.2d 349 (C.A. 1, 1962), where it was held that the prior issuance of an accident investigation report by the Civil Aeronautics Board fixing pilot error as the probable cause of an aircraft crash did not preclude the Board from deciding whether to suspend the certificate of the pilot in the same accident.

[25] There is no " 'bias' in the invidious sense" even where a case comes before a judge who has previously stated his disbelief of the testimony of a party. See *MacKay* v. *McAlexander* 268 F.2d 35, 39 (C.A. 9, 1959), *certiorari denied*, 362 U.S. 961 (1960). See also *Federal Trade Commission* v. *Cement Institute, supra* n. 22, 333 U.S. at 702-703.

sion v. *R. A. Holman & Co.*, 323 F. 2d 284, 287 (C.A.D.C., 1963), *certiorari denied*, 375 U.S. 943; *R. A. Holman & Co.* v. *Securities and Exchange Commission*, *supra* note 15, CCH Fed. Sec. L. Rep. ¶ 91,-816 at 95,791) and it simply did not make a sufficient showing, in the words of the Court of Appeals for the Second Circuit, to become "entitled to subpoena Commission members and staff." *R. A. Holman & Co.* v. *Securities and Exchange Commission*, *supra* note 15, CCH Fed. Sec. L. Rep. ¶ 91,816, at 95,791. In fact, petitioner's counsel conceded that he merely wanted the subpoenas "to discover whether or not there exists evidence sufficient to justify a formal charge of bias and prejudice . . ." (R. 5121).

C. *Permitting Random Inquiry into the State of Mind of Decisional Officers Would Destroy the Administrative Process.*

It would be destructive of the administrative process to permit random inquiries regarding the state of mind of administrative adjudicators during the decisional process. *United States* v. *Morgan*, *supra* p. 28, 313 U.S. at 422, states:

> "We have explicitly held . . . that 'it was not the function of the court to probe the mental processes of the Secretary [of Agriculture]' . . . . Just as a judge cannot be subject to such a scrutiny, . . . so the integrity of the administrative process must be equally respected."

If the comments of such adjudicators may be revealed, the free discussion required in order to arrive at a rational conclusion would be withheld because "cau-

tion or worse would remove all candor from their minds and tongues." *National Labor Relations Board* v. *Botany Worsted Mills, Inc.*, 106 F.2d 263, 267 (C.A. 3, 1939).[26] And permitting such inquiries into the decision-making process would permit litigants unreasonably to delay administrative proceedings. As the court in *Botany Worsted* noted:

> "The function of deciding controversies might soon be overwhelmed by the duty of answering questions about them." (106 F.2d at 267.)

D. *The Cases Relied Upon by Petitioner Are Inapplicable.*

Petitioner's reliance (Br. 32-40) on *United States* v. *Andolschek*, 142 F.2d 503 (C.A. 2, 1944), *Jencks* v. *United States*, 353 U.S. 657 (1957), *Berkshire Employees Assoc.* v. *National Labor Relations Board*, 121 F.2d 235 (C.A. 3, 1941), *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F.2d 260 (C.A. D.C., 1962), and *Federal Home Loan Bank Board* v. *Long Beach Federal Savings & Loan Association*, 295 F.2d 403 (C.A. 9, 1961), as supporting its contention that it was entitled to the issuance of the subpoenas, is misplaced.

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[26] The court in *Botany Worsted* further said, "The logic of this position requires the preservation from questioning of each member of the general body. . . . We are glad, therefore, to ensure to the members of the Labor Board the same protection accorded to jurors since the 18th Century. In so doing we do not disregard the fact that the Board is commanded by statute to act as prosecutor as well as judge, and to appear in this Court as a party litigant. . ." (106 F.2d at 267).

In *Andolschek* it was held that in a criminal prosecution the government could not refuse to produce documents that "directly touch[ed] the criminal dealings" [27] (142 F.2d at 506). The holding in *Jencks*, was that a "criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at trial" (353 U.S. at 672). The Commission did comply with the principle of the *Jencks* case, since petitioner's counsel was furnished the transcripts he requested of the statements made by a staff witness in order to facilitate cross-examination. Neither of these cases is relevant here, where the information sought by the subpoenas did not relate to any of the charges against the Exchange and did not involve statements, except for the transcripts produced, of any witnesses in the proceeding.

In *Berkshire*, *supra*, 121 F.2d at 238-239, the question was not whether the agency member involved merely had an opinion in advance of the proceeding as to the illegality of the practices by the company and the appropriate remedy, but whether the member had actually taken steps unauthorized by statute to impair that company's operations. The court held that correspondence of the member prior to the proceeding suggesting that he had been endeavoring to assist

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[27] *Andolschek*, unlike the case at bar, "involved the prosecution of a crime consisting of the very matters recorded in the suppressed document. . ." (142 F.2d at 506).

in a boycott against the company should have been admitted into evidence so that the Labor Board could determine whether or not that member was disqualified from participating in the decision. This is not comparable to the instant case, where no evidence indicating bias has been produced. Moreover, as the *Berkshire* court noted, 121 F.2d at 239, "This is obviously not like a case . . . where a litigant seeks to subject an administrative body to interrogatories to discover the inner workings of the administrator's mind."

In *Amos Treat, supra*, 306 F.2d 260, the charge was that the Director of the Commission's Division of Corporation Finance had had responsibility for the initiation, conduct, and supervision of an investigation factually related to a subsequent disciplinary proceeding against a broker-dealer which, upon the Director's elevation to Commissioner, he participated in instituting. Here, however, petitioner merely alleges:

> "Many of the facts referred to in the charges as constituting violations occurred during the years when Messrs. Cohen and Woodside were active members of the staff, and prior to their respective appointments to membership on the Commission." (Br. 28.)[28]

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[28] *American Cyanamid Co.* v. *Federal Trade Commission, infra* n. 31, 363 F.2d 757, 763 (C.A. 6, 1966), is also clearly distinguishable. There the Court held that Chairman Dixon of the Federal Trade Commission was disqualified to decide the case because he, prior to his appointment to the Commission, and "in his former capacity as Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monoply of the Committee on the Judiciary of the United

Neither Chairman Cohen nor Commissioner Woodside had ever served on the staff of the Commission's Division of Trading and Exchanges (subsequently Trading and Markets), the Division which prepared the report on petitioner that led to the proceeding against it. Further, this contention of petitioner was not made to the Commission and, accordingly, should not be recognized here since Section 25(a) of the Securities Exchange Act, 15 U.S.C. 78y(a), explicitly provides that "no objection to the order of the Commission shall be considered by the court unless . . . [it] shall have been urged before the Commission.[29] And it

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States Senate, played an 'active role' in an investigation by that Subcommittee of many of the same facts and issues of the same parties as are involved in this proceeding, and participated in the preparation of the report of the Subcommittee on the same facts, issues and parties."

The Court further limited its holding as follows (363 F.2d at 768): "We do not hold that the service of Mr. Dixon as counsel for the subcommittee, standing alone, necessarily would require disqualification. Our decision is based upon the depth of the investigation and the questions and comments by Mr. Dixon as counsel, as shown by the record in this case, including Appendix E." This appendix to the Court's opinion, detailing the extent and nature of Chairman Dixon's involvement, is 29 pages long (363 F.2d 787-817).

This Court distinguished that case in *Safeway Stores Inc.* v. *Federal Trade Commission, supra* p. 28.

[29] As this Court stated in *Lile* v. *Securities and Exchange Commission*, 324 F.2d 772, 773 (1963):

> "This provision is an express limitation upon this Court's jurisdiction in this proceeding and, upon that ground, we must dismiss the petition without reaching the merits."

See also *Gearhart & Otis, Inc.* v. *Securities and Exchange Commission*, 348 F.2d 798, 801 (C.A.D.C., 1965); *Gilligan,*

should be noted that the *Amos Treat* decision appears to have been limited by the determination of the same court in *Securities and Exchange Commission* v. *R. A. Holman & Co.*, 323 F.2d 284 (1963) and by the Court of Appeals for the Second Circuit in *Holman* v. *Securities and Exchange Commission, supra* note 15, CCH Fed. Sec. L. Rep. ¶ 91,816. In the latter case, the Court noted that to disqualify the Commissioner involved on the record [30] before it "would be tantamount to disqualifying from participation in an SEC adjudicatory proceeding all personnel from the Divisions of Corporation Finance and Trading and Exchanges without regard to the extent of their connection with the proceeding in its investigatory stages, and would tend to prevent the appointment to the Commission of persons who have had previous experience with its work" (CCH Fed. Sec. L. Rep. ¶ 91,816, at 95,790).

In *Federal Home Loan Bank Board*, the holding of this Court was that the hearing examiner was not validly appointed (295 F.2d at 409). Further, the verified statement set forth as "Appendix C" to the District Court's opinion, *Long Beach Federal Savings and Loan Association* v. *Federal Home Loan Bank Board*, 189 F. Supp. 589, 621-622 (S.D. Calif., 1960), states that the challenged Board members were personal defendants and the association was plaintiff "in

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Will & Co. v. *Securities and Exchange Commission*, 267 F.2d 461, 468 (C.A. 2, 1959), *certiorari denied*, 361 U.S. 896; *Nassau Securities Service* v. *Securities and Exchange Commission, supra* n. 9, 348 F.2d at 136; *Barnett* v. *United States*, 319 F.2d 340, 345 (C.A. 8, 1963).

[30] See *supra* n. 15.

bitterly contested litigation involving over 20 millions of dollars," that the association was "asking judgments, accounting, return of seized and misappropriated assets and property against said Board. . .," and that "bitter personal animosity, bias and prejudice has arisen in said Board against said Association. . . ." No comparable circumstances are present in this case.

E. *Petitioner Has Not Complied with Section 7(a) of the Administrative Procedure Act.*

The District Court in *Federal Home Loan Bank Board* found that Section 7(a) of the Administrative Procedure Act, 5 U.S.C. 1006(a), requiring a sufficient and timely affidavit of bias and prejudice, was applicable (189 F. Supp. at 611).[31] Nothing in the opinion of this Court, reversing the District Court on other grounds, appears to suggest that this ruling was incorrect, and recently this Court dealt with the question of timeliness under Section 7(a) where the disqualification of the Chairman of the Federal Trade Commission was sought. *Safeway Stores, Inc.* v. *Federal Trade Commission*, *supra* p. 28.

Section 7(a) provides in pertinent part:

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[31] The District Court's opinion on this point was recently cited by the Court of Appeals for the Second Circuit in *R. A. Holman & Co.* v. *Securities & Exchange Commission*, *supra* note 15, CCH Fed. Sec. L. Rep. ¶ 91,816 at 95,792. *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757, 764 (C.A. 6, 1966), held that § 7(a) applies where the disqualification of a commission member is sought.

> "The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case."

Petitioner's counsel has conceded that this procedure was not followed, stating, "We did not file an affidavit of prejudice against anyone . . ." (R. 5086). Even if the affidavit of counsel for the Exchange, which was a part of the application for the subpoena *duces tecum* directed to the Commission's Secretary (R. 4967-4970), is regarded as intended to fulfill the prerequisite of an "affidavit of personal bias and disqualification," it meets neither the requirement that it be "sufficient" [32] nor the requirement that it be "timely" filed.

The District Court in the *Federal Home Loan Bank Board* case, *supra* p. 36, 189 F. Supp. at 611, stated, " 'Timely' means at the first reasonable opportunity

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[32] The requirement of sufficiency is defined in *Long Beach Federal Savings and Loan Association* v. *Federal Home Loan Bank Board, supra* p. 36, 189 F. Supp. at 612, as follows: " 'Sufficient' means allegations of fact as distinguished from conclusions. And the facts must be such that, taken to be true as stated, they would be sufficient to convince an unbiased, unprejudiced and disinterested mind." As we have seen (*supra* pp. 25-27) that requirement has not been met in the case at bar.

after discovery of the facts tending to show disqualification." [33] The requirement that an affidavit of bias be filed promptly must be complied with because a litigant cannot be allowed to wait and decide whether he likes his subsequent treatment before raising the issue. See *Safeway Stores, Inc.* v. *Federal Trade Commission, supra* p. 28; *In re United Shoe Machinery Corp.*, 276 F.2d 77, 79 (C.A. 1, 1960); *Peckham* v. *Ronrico Corp.*, 288 F.2d 841 (C.A. 1, 1961). Here, although all facts upon which counsel's affidavit was based were known in July 1962, it was not filed until February 11, 1963, after extensive hearings had been held, 2300 pages of testimony had been taken, numerous exhibits presented, and the Division had concluded presentation of its case (R. 5112). *Cf. R. A. Holman & Co.* v. *Securities and Exchange Commission, supra* note 15, CCH Fed. Sec. L. Rep. ¶ 91,816 at 95,791. Even an affidavit of bias and prejudice against a trial judge filed on the day of trial has been held to be untimely where the facts upon which it was based had been known prior thereto. *Rossi* v. *United States*, 16 F.2d 712, 716-717 (C.A. 8, 1926); *Chafin*

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[33] See *Chessman* v. *Teets*, 239 F.2d 205, 215 (C.A. 9, 1956), *vacated on other grounds* 354 U.S. 156 (1957); *Faubus* v. *United States*, 254 F.2d 797, 803-804 (C.A. 8, 1958), *certiorari denied*, 358 U.S. 829 (1958). See also *Marquette Cement Mfg. Co.* v. *Federal Trade Commission*, 147 F.2d 589, 592 (C.A. 7, 1945), *affirmed without reaching the issue of timeliness sub nom. Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700-703 (1948), and *North American Airlines* v. *Civil Aeronautics Board*, 240 F.2d 867 (C.A.D.C., 1956), *certiorari denied*, 353 U.S. 941 (1957).

v. *United States*, 5 F.2d 592 (C.A. 4, 1925), *certiorari denied*, 269 U.S. 552 (1925).

CONCLUSION

For the foregoing reasons the order of the Commission should be affirmed.

Respectfully submitted,

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Dated: November 1966

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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